No. 14661

In the United States Court of Appeals for the Ninth Circuit

SAM D. RAWSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The district court's unreported opinion appears at pages 42–45 of the record.

JURISDICTION

The jurisdiction of the district court rested on 28 U. S. C. sec. 1345 (R. 3). A final judgment and order of injunction was entered on December 23, 1954 (R. 47–51). Notice of appeal was filed on January 20, 1955 (R. 51). The jurisdiction of this Court rests on 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether land purchased by the United States for a specific purpose is open to location under the general mining laws.

STATEMENT

This is an action by the United States to enjoin appellant from occupying a tract of Government land and from removing volcanic cinders therefrom. The land consists of 20 acres located in Section 13, Township 11 South, Range 12 East, of the Willamette Meridian in Jefferson County, Oregon. The facts are not in dispute (R. 3–9) and may be summarized as follows:

In January 1915, the Department of the Interior issued a homestead patent to a tract of land containing 160 acres, which included the 20 acres here involved, to Marie R. Stoller. On July 12, 1937, the United States purchased a tract of land containing 607.81 acres, which included the 160 acres, from the grantee of Stoller. The land was acquired for the purpose of retiring submarginal lands from agricultural use, preventing soil erosion, to protect watersheds, to conserve wildlife, and other allied purposes. The purchase was made with funds appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115. In June, 1938, these lands were, by Executive Order No. 7908 (App. 13–14), designated for administration by the Secretary of Agriculture under the Bankhead-Jones Farm Tenant Act (App. 14–16). (R. 20–21).

In 1940, the United States Department of Agriculture and the State Highway Commission of Oregon entered into a fifty year licensing agreement whereby the Highway Commission was authorized to remove stone, gravel and similar substances from the land

here involved for use in construction upon or in connection with the property (R. 7–8).

On February 17, 1951, appellant posted a notice of location of a placer mining claim on the 20 acres here involved, and filed the notice in the office of the County Clerk of Jefferson County, Oregon. Thereupon, appellant entered upon said land and removed quantities of volcanic cinders (R. 21).

On March 5, 1952, the United States brought this action to declare appellant's placer mining claim invalid, to permanently enjoin him from using or occupying the land and removing volcanic cinders therefrom, and for a judgment for the value of the cinders removed (R. 16). On September 28, 1954, the court filed an opinion in which it held that the land on which appellant had filed a placer mining claim was not subject to disposal under the general mining laws (R. 42–45). A final judgment and order of injunction was entered on December 23, 1954 (R. 47–51), reaffirming a judgment and order entered December 28, 1953 (R. 23–26).[1] Appellant's mining claim was adjudged to be null and void and of no force and effect, and he was permanently enjoined from entering, trespassing, occupying, possessing or removing cinders from the land. He was ordered to pay the sum of $120.00 damages for the removal of cinders prior to

[1] The appellant, on January 29, 1954, filed a motion to vacate the judgment of December 28, 1953, which was characterized as an "interlocutory judgment," primarily on grounds of newly discovered evidence. The court considered the motion on its merits without passing on the question whether it was interlocutory (R. 43).

the order of injunction. This appeal followed (R. 51).

ARGUMENT

Appellant has no right in the minerals underlying the land in question

A. *The mining laws apply only to lands which are "public domain" or "public lands" of the United States.*—Appellant's primary contention (Br. 28–40) is that he may make a mineral entry of the land in question under Title 30 U. S. C. sec. 22, which provides for mineral entries on "lands belonging to the United States." This language first appeared in the Act of May 10, 1872, 17 Stat. 91, opening to exploration and purchase "all valuable mineral deposits in lands belonging to the United States." Prior to that time, mineral lands were subject to disposition under the Act of July 26, 1866, 14 Stat. 251, which related to "the mineral lands of the *public domain.*" [Italics supplied.] "Public domain" or "public lands" were authoritatively defined in *Newhall* v. *Sanger,* 92 U. S. 761, 763 (1875), where the Supreme Court declared that "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." That has been quoted and reaffirmed in numerous cases. *Union Pacific R. R. Co.* v. *Harris,* 215 U. S. 386, 388 (1910); *Minnesota* v. *Hitchcock,* 185 U. S. 373, 391 (1902); *Barker* v. *Harvey,* 181 U. S. 481, 490 (1901); *Mann* v. *Tacoma Land Company,* 153 U. S. 273, 284 (1894); *Bardon* v. *Northern Pacific Railroad,* 145 U. S. 535, 538 (1892). "Public domain" has the same meaning. *Barker* v. *Harvey, supra.*

Hence, it is quite clear that under the 1866 Act mineral claims could be established only on lands forming part of the public domain or "public lands" of the United States, i. e., lands held by the United States for disposition under the general land laws. Appellant's argument (Br. 29) that by using the phrase "lands belonging to the United States" rather than the phrase "public domain" broadened the category of lands to which the 1872 Act applies, was answered by the Supreme Court in *Oklahoma* v. *Texas,* 258 U. S. 574, 599–600 (1922). The Court there said:

> This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western States. *Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply;* and it never applies where the United States directs that the disposal be only under other laws. [Emphasis added.]

Thus, it is established that there is no difference in meaning between the 1872 Act and its predecessor, the Act of 1866, and that entry under both of these statutes is confined to public domain, i. e., lands held by the United States for disposal under the general land laws.

The attempt by appellant (Br. 33–35) to limit the application of *Oklahoma* v. *Texas, supra,* to the State of Oklahoma must fail since the 1872 Act obviously has the same meaning as applied to Oklahoma as to any other State. It should be noted that the legislative history of the 1872 Act completely supports the view that in regard to the present controversy the two acts had the same meaning. A bill to modify the 1866 act in certain procedural aspects, exactly repeating the language "public domain" of that Act, passed the Senate on February 7, 1871, but was not acted upon by the House. S. 1103, 41st Cong., 3d sess.; Cong. Globe, pp. 897, 1026.[2] A similar modification was undertaken in the second session of the 42d Congress by H. R. 1016, which passed both houses and was approved May 10, 1872. 17 Stat. 91. That act provided "That all valuable mineral deposits in *lands belonging to the United States,* both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase * * *." [Emphasis added.] Representative Sargent, who introduced the 1872 bill and was in charge of it in the House, said in explaining it, "The bill does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest de-

[2] At page 1026 the bill is mistakenly called H. R. 1103.

gree the policy of the Government in the disposition of the mining lands." Cong. Globe, 42d Cong., 2d sess., p. 534. Referring to the Senate bill in the previous Congress, he said, "The only change from the Senate bill, I believe, is in the matter of advertising notice * * *." *Ibid.*

These statements by the sponsor of the 1872 act clearly show that it was not intended to have any broader application than the previous mineral law relating to the "public domain"; and there is nothing in the congressional debates on the measure to suggest that anyone took a different view of it.[3]

The mining laws thus relate only to the "public domain" and are inapplicable here, since the land in question was not "public domain."

B. *The land here in question was acquired by the United States for a specific purpose, has never been*

[3] That it was understood to be limited to public lands is indicated, for example, by the fact that a proposal for special disposition of the proceeds of mineral lands under the act was withdrawn when Senator Pomeroy suggested, "I think the Senator had better withdraw his amendment and let us consider it by itself on the bill which appropriates the proceeds of the *public lands*. The mineral lands will properly be considered under that bill * * *." Cong. Globe, 42nd Cong., 2d sess., p. 2462 (1872). [Emphasis added.]

There was no House report on the measure (see Cong. Globe, 42d Cong., 2d sess., pp. 395, 534 (1872)). The Senate report (see *ibid.*, p. 2058) seems not to have been printed, either as a congressional document or in the Appendix to the Congressional Globe. The act, as printed in Statutes at Large, carries the marginal synopsis, "Valuable mineral deposits in *public lands* and the lands to be open to citizens, etc." [Emphasis added.] 17 Stat. 91.

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added to the public domain, is not held for disposition under the general land laws of the United States, and hence is not subject to entry under the mining laws.— This land was purchased by the United States on July 12, 1937, with funds appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115, which authorized the acquisition of lands for use in projects, *inter alia,* of "prevention of soil erosion" (49 Stat. p. 116). On July 20, 1937, it was placed under the control and management of the Secretary of Agriculture in connection with such a soil erosion project by Executive Order No. 7672 (Br. 11–13). Plainly, the land at this point was not subject to disposal under the general land laws. *United States* v. *Holliday,* 24 F. Supp. 112 (D. Mont. 1938); cf. *Jones* v. *United States,* 195 F. 2d 707, 709 (C. A. 9, 1952).

Appellant's reliance on Executive Order No. 7672 as opening the land to disposition under the mineral laws (Br. 11–27) is unavailing. A mere reading of that order shows that it was not intended to subject any lands to the mining laws which prior to the withdrawal were not subject to such laws. The proviso plainly means only that such of the withdrawn lands as could be entered under the mining laws prior to withdrawal remain subject to such entry. That refers in terms to lands which previously could be entered "under the applicable laws." For reasons stated above, this land prior to the withdrawal was not subject to the general land laws, and the executive order shows

no intention of bringing that about.[4] Certainly there is no warrant for construing this proviso, which is normal in withdrawal orders, so as to extend the mining laws to properties to which they would not otherwise apply. The mere fact that all of Sec. 13 at one time had been disposed of, so heavily relied upon by appellant (Br. 12–16), does not justify such an expansion of the proviso, nor does it indicate that none of the lands mentioned in the Executive Order were subject to disposal under the mining laws.

C. *Pursuant to authority given by Congress the mineral deposits on this land were validly disposed of prior to appellant's pretended entry.*—While for reasons stated above, this land after acquisition by the United States was not within the scope of the general land laws, the further history demonstrates beyond question

[4] There is nothing in the opinion of the Attorney General, 40 Op. A. G. 73, cited by appellant (Br. 20–22), which lends any support whatever to his pretended claim. That opinion refers only to unpatented land forming part of the public domain, and thus subject to the mineral laws before the withdrawal. The opinion holds merely that public domain land withdrawn temporarily under the Withdrawal Act of 1910, 36 Stat. 847, does not suspend the operation of the mineral laws. The opinion thus has no bearing with respect to lands purchased by the United States as distinct from lands always a part of the public domain. Moreover, even if public domain lands were here involved, the Attorney General's opinion makes clear that the President and, of course, the Congress can so dedicate lands to a permanent use as to exclude them from the operation of the general land laws. And, as shown, *infra*, pp. 11–12, this land has been so disposed of by valid administrative action pursuant to statutory authority. As the Supreme Court stated in *Oklahoma* v. *Texas*, 258 U. S. 574, 600 (1922): "* * * it [30 U. S. C. sec. 22] never applies where the United States directs that the disposal be only under other laws."

that rather than exposing this land for disposition under such general laws Congress has, in fact, authorized its disposition under special legislation. On June 9, 1938, the land was specifically transferred to the Secretary of Agriculture by Executive Order No. 7908 (App. 13–14), for administration under the Bankhead-Jones Farm Tenant Act approved July 27, 1937 (50 Stat. 522, 525, 7 U. S. C. sec. 1011).[5] Congress thereby gave the Secretary of Agriculture very broad powers as to the use or disposition of lands acquired to effectuate the program provided for under this Act (App. 14–16). He could "sell, exchange, lease, or otherwise dispose of" any property so acquired, but only to public authorities and only on condition that the property is used for public purposes. Clearly, lands expressly subjected to disposal by the Secretary of Agriculture, and only to public authorities for public purposes, could not at the same time be lands sub-

[5] Executive Order No. 7027, issued April 30, 1935, established the Resettlement Administration, which was vested with the functions and duties of initiating and administering "a program of approved projects with respect to soil erosion, * * *." On January 1, 1937, by Executive Order No. 7530, all of the powers, functions, duties and property of the Resettlement Administration were transferred to the Secretary of Agriculture. Executive Order No. 7908 covered all of those projects that had been transferred to him by the previous Executive Orders, and included "lands thereafter acquired." The land here in question was acquired for soil erosion projects after Executive Order No. 7530 transferring the projects to the Secretary of Agriculture had been issued. It is clear, therefore, from the face of the orders, that appellant's argument (Br. 8, 43) that there is no evidence to support a finding that Executive Order No. 7908 applies to this particular land is without merit.

ject to disposal under the general land laws to private individuals and for private gain.

The placing of these lands under the sole jurisdiction of the Secretary of Agriculture in and of itself repels any notion that such lands were subject to the general land laws or mineral laws of the United States. The administration of those laws traditionally is in the hands of the Secretary of the Interior, and the placing of this land under the Secretary of Agriculture shows Congressional intention that it be disposed of, if at all, only for purposes which he should determine upon under the Bankhead-Jones Farm Tenant Act. It is true that nine years later in 1946, Congress transferred to the Secretary of the Interior the function of control of mineral deposits in lands of this category. (Sec. 402 Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099; App. 16–17.) His authority, however, was conditioned upon his being advised by the Secretary of Agriculture that any contemplated disposition of minerals "will not interfere with the primary purposes for which the land was acquired, and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes." Appellant does not, of course, pretend that these conditions have been or can be met with respect to the land here involved. On the contrary, we proceed now to show that the materials which appellant seeks, long prior to the 1946 Reorganization Plan, had been otherwise disposed of by the Secretary of Agriculture.

In 1940, the Secretary of Agriculture exercised his powers under the Bankhead-Jones Farm Tenant Act

by entering into a licensing agreement for a period of fifty years with the State Highway Commission of Oregon. This gives the State the right to use materials from the land here involved for use for construction purposes (R. 7–8). It was not until after the state contractor was extracting volcanic cinders from the land that appellant, in 1951, made his location. Quite obviously, the licensing agreement with the State of Oregon was within the authority of the Secretary of Agriculture, and is valid. It follows that appellant could not acquire any rights to materials which previously had been disposed of. *United States* v. *Schaub,* 103 F. Supp. 873 (D. Alaska, 1952), affirmed *per curiam,* 207 F. 2d 325 (C. A. 9, 1953).[6]

CONCLUSION

It is submitted that the judgment should be affirmed.

Respectfully,

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JUNE 1955.

[6] As in the *Schaub* case, it has been asumed that this volcanic material is a mineral within the meaning of the general mining laws.

APPENDIX

Executive Order No. 7908 June 9, 1938, 3 F. R. 1389, provides:

TRANSFERRING CERTAIN LANDS TO THE SECRETARY OF AGRICULTURE FOR USE, ADMINISTRATION, AND DISPOSITION UNDER TITLE III OF THE BANKHEAD-JONES FARM TENANT ACT

WHEREAS I find suitable for the purposes of Title III of the Bankhead-Jones Farm Tenant Act, approved July 27, 1937 (50 Stat. 522, 525), and the related provisions of Title IV thereof, all lands of the United States now under the supervision of the Secretary of Agriculture (1) which have been acquired by the Department of Agriculture for use in connection with those land-development and land-utilization projects transferred to it by Ex. Order No. 7530 of Dec. 31, 1936, as amended by Ex. Order No. 7557 of Feb. 19, 1937 (including lands transferred to it by the said Ex. order, lands thereafter acquired pursuant to the said Ex. order, as amended, lands set apart and reserved from the public domain, and lands acquired by transfer from other Federal agencies, whether by Ex. order or otherwise), and (2) which are now in process of acquisition by the Dept. of Agriculture, pursuant to existing contracts of purchase and pending condemnation proceedings, for use in connection with the said projects:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by section 45 of the said Bankhead-Jones Farm Tenant Act, it is ordered that all the right, title, and interest of the United States in the lands so acquired or in process of acquisition, be, and they are hereby, transferred to the Secretary of Agriculture for

use, administration, and disposition in accordance with the provisions of Title III of the said Act and the related provisions of Title IV thereof; and immediately upon acquisition of legal title to those lands now in process of acquisition, this order shall become applicable to all the additional right, title, and interest thereby acquired by the United States;

Provided, that no lands heretofore set apart and reserved from the public domain shall be disposed of by sale, exchange, or grant, in accordance with the provisions of said act, without the approval of the Secretary of the Interior;

And Provided further, that this order shall not apply to any of the said lands which have been, by Executive order or proclamation, included in or reserved as a part of a national forest or of a wildlife, waterfowl, migratory bird, or research refuge, or to the right, title, and interest of the United States in the mineral resources of those lands which have heretofore been set apart and reserved from the public domain, and shall not restrict the disposition of such mineral resources under the public-land laws.

Secs. 31, 32, Title III of the Bankhead-Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 525, as amended by the Act of July 28, 1942, 56 Stat. 725, 7 U. S. C. sec. 1011, provides:

SEC. 31. The Secretary is authorized and directed to develop a program of land conservation and land utilization, including the retirement of lands which are submarginal or not primarily suitable for cultivation, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, mitigating floods, preventing impairment of dams and reservoirs, conserving surface and subsurface moisture, protecting the watersheds of navigable

streams, and protecting the public lands, health, safety, and welfare.

Powers Under Land Program

Sec. 32. To effectuate the program provided for in section 31, the Secretary is authorized—

(a) To acquire by purchase, gift, or devise, or by transfer from any agency of the United States or from any State, Territory, or political subdivision, submarginal land and land not primarily suitable for cultivation, and interests in and options on such land. Such property may be acquired subject to any reservations, outstanding estates, interests, easements, or other encumbrances which the Secretary determines will not interfere with the utilization of such property for the purposes of this title.

(b) To protect, improve, develop, and administer any property so acquired and to construct such structures thereon as may be necessary to adapt it to its most beneficial use.

(c) To sell, exchange, lease, or otherwise dispose of, with or without a consideration, any property so acquired, under such terms and conditions as he deems will best accomplish the purposes of this title, but any sale, exchange, or grant shall be made only to public authorities and agencies and only on condition that the property is used for public purposes: *Provided, however,* That an exchange may be made with private owners and with subdivisions or agencies of State governments in any case where the Secretary of Agriculture finds that such exchange would not conflict with the purposes of the Act, and that the value of the property received in exchange is substantially equal to that of the property conveyed. The Secretary may recommend to the President other Federal, State, or Territorial agencies to administer such property, together with the conditions of use and administration which will best serve the purposes of a land-conservation

and land-utilization program, and the President is authorized to transfer such property to such agencies.

(d) With respect to any land, or any interest therein, acquired by, or transferred to, the Secretary for the purposes of this title, to make dedications or grants, in his discretion, for any public purpose, and to grant licenses and easements upon such terms as he deems reasonable.

(e) To cooperate with Federal, State, Territorial, and other public agencies in developing plans for a program of land conservation and land utilization, to conduct surveys and investigations relating to conditions and factors affecting, and the methods of accomplishing most effectively, the purposes of this title, and to disseminate information concerning these activities.

(f) To make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property acquired by, or transferred to, the Secretary for the purposes of this title, in order to conserve and utilize it or advance the purposes of this title. Any violation of such rules and regulations shall be punished as prescribed in section 5388 of the Revised Statutes, as amended (U. S. C., 1934 ed., title 18, sec. 104).

Sec. 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, 5 U. S. C. secs. 133y–16, p. 140, 1952 Ed., provides:

> Sec. 402. *Functions relating to mineral deposits in certain lands.*—The functions of the Secretary of Agriculture and the Department of Agriculture with respect to the uses of mineral deposits in certain lands pursuant to the provisions of the Act of March 4, 1917 (39 Stat. 1134, 1150, 16 U. S. C. 520), Title II of the National Industrial Recovery Act of June 16, 1933, (48 Stat. 195, 200, 202, 205, 40 U. S. C.

401, 403 (a) and 408), the 1935 Emergency Relief Appropriations Act of April 8, 1935 (48 Stat. 115, 118), section 55 of Title I of the Act of August 24, 1935 (49 Stat. 750, 781), and the Act of July 22, 1937 (50 Stat. 522, 525, 530), as amended July 28, 1942 (56 Stat. 725, 7 U. S. C. 1011 (c) and 1018), are hereby transferred to the Secretry of the Interior and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of the Interior as he may designate: *Provided,* That mineral development on such lands shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes. The provisions of law governing the crediting and distribution of revenues derived from the said lands shall be applicable to revenues derived in connection with the functions transferred by this section. To the extent necessary in connection with the performance of the functions transferred by this section, the Secretary of the Interior and his representatives shall have access to the title records of the Department of Agriculture relating to the lands affected by this section.

U. S. GOVERNMENT PRINTING OFFICE: 1955